No. 95-1869

Supreme Court, U.S.
FILED
JUN 19 1996
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

LEO A. DAMMER,

Petitioner,

vs.

MERCEDES-BENZ OF NORTH AMERICA, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

RESPONDENT'S BRIEF IN OPPOSITION

CARMINE A. IANNACCONE
Counsel of Record
TERRI L. FREEMAN
HANNOCH WEISMAN
A Professional Corporation
Attorneys for Respondent
Four Becker Farm Road
Roseland, New Jersey 07068
(201) 535-5300

8713
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

30 pp

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction to consider the questions presented by Petitioner in light of the fact that both questions presented by this Petition are moot because in entering and upholding summary judgment in favor of Respondent, neither court below held that a plaintiff asserting an age discrimination case in the context of a reduction-in-force must prove that he was replaced by an individual outside the protected class in order to establish a *prima facie* case.

2. Whether this Court has jurisdiction to consider the questions presented by Petitioner in light of the fact that both questions presented by this Petition are moot because in entering and upholding summary judgment in favor of Respondent, both courts below assumed that Petitioner established his *prima facie* case, but held that Respondent was nonetheless entitled to summary judgment because Petitioner failed to present evidence that Respondent's proffered reason for his termination was pretext.

STATEMENT PURSUANT TO RULE 29.6

The parent company of Mercedes-Benz of North America, Inc. is Daimler Benz N.A. Corp. Mercedes-Benz of North America, Inc. does not have any nonwholly owned subsidiaries.

TABLE OF CONTENTS

	Page
Questions Presented	i
Statement Pursuant to Rule 29.6	ii
Table of Contents	iii
Table of Citations	iv
Statement of the Case	1
Statement of Facts	1
Summary of Argument	6
Reasons for Denying the Writ	9
I. This Court Does Not Have Jurisdiction To Decide The Questions Presented By Petitioner In That Both Questions Are Moot Because Neither Court Below Rested Its Decision To Enter Or Uphold Summary Judgment On The Fact That Mr. Dammer Failed To Establish That He Was Replaced By An Individual Under 40.	9
II. Mr. Dammer Could Not Establish A *Prima Facie* Case Of Age Discrimination Below Because He Could Not Show That Employees Outside The Protected Class Were Treated More Favorably Than Those Within The Protected Class.	11

Contents

Page

III. Regardless Of What This Court Deems To Be The Proper Final Element Of A *Prima Facie* Case, The Parties' Rights Will Not Be Affected Because Mr. Dammer Does Not, By This Petition, Challenge The Lower Courts' Findings Regarding His Failure To Meet His Ultimate Burden Of Proving Pretext. 16

Conclusion 23

TABLE OF CITATIONS

Cases Cited:

Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 202 (1986) 11, 12

Celotex Corp. v. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (U.S. Dist. Col. 1988) . 11, 12

Chipollini v. Spencer Gifts, Inc., 814 F.2d 893 (3d Cir.), *cert. dismissed*, 483 U.S. 1052, 108 S. Ct. 26, 97 L. Ed. 2d 815 (1987) 12, 13

Church of Scientology of California v. United States, 506 U.S. 9, 113 S. Ct. 447, 121 L. Ed. 2d 313 (1992) 9

Duffy v. Wheeling Pittsburgh Steel Corp., 738 F.2d 1393 (3d Cir.), *cert. denied*, 469 U.S. 1087, 105 S. Ct. 592, 83 L. Ed. 2d 702 (1984) 12, 13

Contents

	Page
Ezold v. Wolf, Block, Schorr and Solis-Cohen, 983 F.2d 509 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993)	17
Fuentes v. Perskie, 32 F.3d 759 (3d Cir. 1994)	18
Gagne v. Northwestern Nat. Ins. Co., 881 F.2d 309 (6th Cir. 1989)	17
Holt v. Gamewell Corp., 797 F.2d 36 (1st Cir. 1986)	15
Massarsky v. General Motors Corp., 706 F.2d 111 (3d Cir. 1983), *cert. denied*, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314	13, 15
Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1955, 95 L. Ed. 2d 527 (1987)	11, 12
McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *aff'd*, 528 F.2d 1102 (1976)	13
Melnyk v. Adria Laboratories, 799 F. Supp. 301 (W.D.N.Y. 1992)	17
Merrick v. Farmers Ins. Group, 892 F.2d 1434 (9th Cir. 1990)	17
Mullen v. New Jersey Steel Corp., 733 F. Supp. 1534 (D.N.J. 1990)	12, 17

Contents

Page

North Carolina v. Rice, 404 U.S. 244, 92 S. Ct. 402, 30 L. Ed. 2d 413 (1971) 9

Perez Perez v. Key Pharmaceuticals, Inc., 729 F. Supp. 204 (D. Puerto Rico 1989) 17

Perry v. Prudential-Bache Securities, Inc., 738 F. Supp. 843 (D.N.J.), *aff'd*, 904 F.2d 696 (3d Cir. 1989), *cert. denied*, 498 U.S. 958, 111 S. Ct. 386, 112 L. Ed. 2d 397 (1990) 12, 17

St. Pierre v. United States, 319 U.S. 41, 63 S. Ct. 910, 87 L. Ed. 1199 (1943) 9

Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981) 13

Torre v. Casio, Inc., 42 F.3d 825 (1994) 18, 20

Turner v. Schering-Plough Corp., 901 F.2d 335 (3d Cir. 1990) 13

Waggoner v. City of Garland, Texas, 987 F.2d 1160 (5th Cir. 1993) 17

STATEMENT OF THE CASE

This case arose as a result of the termination of Leo A. Dammer (hereinafter "Mr. Dammer") during the implementation of a company-wide reduction-in-force which took place at Mercedes-Benz of North America, Inc. (hereinafter "MBNA") on or about September 4, 1991. In his complaint, Mr. Dammer alleged *inter alia* that he was terminated from his position at MBNA as a result of his age in violation of the New Jersey Law Against Discrimination (hereinafter the "NJLAD") and the Age Discrimination in Employment Act (hereinafter the "ADEA").

On or about December 26, 1991, Mr. Dammer filed a charge against MBNA with the Division of Civil Rights/Equal Employment Opportunity Commission (hereinafter the "EEOC"). Mr. Dammer alleged that he was terminated from his position at MBNA because of his age and in violation of the ADEA. On or about May 8, 1992, after an analysis of the merits of Mr. Dammer's charge, the EEOC determined that the evidence did not establish a violation of the ADEA and entered a finding of "no probable cause."

Thereafter, Mr. Dammer filed the instant action again asserting the very same allegations already dismissed by the EEOC. MBNA filed a motion for summary judgment. After oral argument, which was heard on or about March 27, 1995, the District Court granted MBNA's motion, dismissing Mr. Dammer's complaint in its entirety. Summary judgment was upheld on appeal to the Circuit Court and Mr. Dammer's petition for rehearing was denied.

STATEMENT OF FACTS

Mr. Dammer is a former employee of MBNA having been

employed as an import supervisor from April 3, 1972 through September 4, 1991.

On September 4, 1991, MBNA implemented a company-wide reduction of its workforce. The restructuring of MBNA's home and field office operations was necessitated by severe economic and business conditions facing MBNA. Specifically, from 1986 through 1991, MBNA suffered a sharp downturn in automobile sales. During that period, new car sales dropped about 42%, from approximately 100,000 in 1986 to approximately 58,000 in 1991.

MBNA's reduction-in-force involved the elimination of numerous employee positions and the consolidation and/or elimination of job functions based upon anticipated business needs.

At the time of the reduction-in-force, Mr. Dammer was employed in the import department at MBNA's headquarters in Montvale, New Jersey. As part of the company-wide restructuring, two positions within the import department were eliminated: (1) the position of import supervisor; and (2) one import clerk position. Both positions were eliminated because it was clear that the essential functions of those positions could be absorbed by the remaining employees in the department with minimal negative impact on the department's current and anticipated operations. Accordingly, the positions were entirely eliminated and their essential functions assigned to the remaining employees in the department. In his deposition, Mr. Dammer admitted that he had not been replaced and that his job duties were absorbed by the remaining staff.

Prior to the reduction-in-force, MBNA employed 657 employees at its Montvale headquarters. Of MBNA's pre-reduction employees, 333 were over the age of 40 (50.68%) and 324 were under the age of 40 (49.32%). As a result of the

reduction-in-force, 74 employees were terminated. Of the employees terminated, 33 were over the age of 40 (44.59%) and 41 were under the age of 40 (55.41%). Of MBNA's workforce remaining after the reduction, 300 were over 40 years of age (51.46%) and 283 were under the age of 40 (48.54%). During the course of the workforce reduction, MBNA eliminated the positions of 12.65% of its under-40 workers, while eliminating only 9.91% of the positions previously held by its over-40 workers. After the workforce reduction, the percentage of MBNA's employees who were over 40 years of age actually increased by .78%.

Mr. Dammer offered no evidence whatsoever to contradict this statistical evidence.

With respect to Mr. Dammer's department, prior to the reduction-in-force, there were 11 employees of whom six were over the age of 40 (54.55%) and five of whom were under the age of 40 (45.45%). The positions of two employees, Mr. Dammer who was over 40 and an import clerk who was under 40, were eliminated. During the course of the workforce reduction, MBNA eliminated 20% of its under-40 workers in the import department, while eliminating only 16.67% of its over-40 workers in the department. As a result of the workforce reduction as it specifically related to Mr. Dammer's department, 55.56% of the remaining employees in the import department are over 40 and 44.44% are under 40. Accordingly, the reduction-in-force resulted in an 1.01% increase in the number of over-40 workers in MBNA's import department.

Once again, Mr. Dammer offered no evidence to dispute these statistics.

In August 1990, more than one year prior to MBNA's reduction-in-force, MBNA offered a voluntary early retirement

package to employees who were at least 55 years of age and had at least 10 years of service with MBNA. Employees who were offered the package had until October 31, 1990 to decide whether or not they would take early retirement. Mr. Dammer was one of the employees who was offered this retirement package. In support of his claims, Mr. Dammer offered the bald assertion that by the time he declined the retirement package, his superiors had already decided to force him out of the import department.

Mr. Dammer offered absolutely no proof below to support this assertion.

Mr. Dammer claimed that four to six weeks after he received the retirement package for consideration, his direct supervisor Erich Lenz told him that the manager of logistics and administrative services, Ernst Ruppert, (the head of Mr. Dammer's department) wanted to know if Mr. Dammer had made his decision yet. Below, Mr. Dammer maintained that this in some way indicated that his superiors wanted him to retire. Mr. Dammer also maintained that this evidenced his superiors' intent in or about August 1990 to terminate him at some later point if he did not voluntarily retire.

Nevertheless, Mr. Dammer's allegations were contradicted by his own deposition testimony wherein he admitted that he did not know when the 1991 reduction-in-force was formulated and that he did not know if the reduction was discussed by Messrs. Ruppert and Lenz at or around the time that he was offered the retirement package in August 1990. Mr. Dammer's unsubstantiated theory was further contradicted by the testimony of Messrs. Ruppert and Lenz because both men testified that they only questioned Mr. Dammer because they were concerned that they would have to replace him if he chose early retirement. According to the testimony of Messrs. Ruppert and Lenz, neither had any plan or intention of eliminating his

position or reducing the staff of the import department in or about August 1990. Further, Mr. Lenz testified that he had no idea of plans to eliminate Mr. Dammer's position until one week prior to the implementation of the reduction-in-force.

Moreover, the District Court found that Mr. Dammer admitted in deposition testimony that no one influenced or even tried to influence his decision regarding early retirement in August 1990. Mr. Dammer also admitted that no one in his department said anything to him which led him to believe that he would be forced out of the department if he declined early retirement. Further, Mr. Dammer admitted that he never heard anyone say anything that led him to believe that his superiors were trying to get rid of him.

To support his claim of age bias, Mr. Dammer pointed to the hiring of three import clerks six to nine months prior to the reduction-in-force, as well as the hiring of a younger employee, Kay-Wolf Ahlden, five months prior to the reduction. However, Mr. Dammer admitted the following facts which completely contradict his allegations: (1) one of the three import clerks was within the protected class (53 years old); (2) the two clerks who were not within the protected class were hired to replace two other clerks who opted for early retirement; and (3) none of the three held a position similar to his own. (*See* Petition at App. 18a.) Pursuant to the testimony of Messrs. Ruppert and Ahlden, Mr. Ahlden's position was unrelated to the position previously held by Mr. Dammer and Mr. Ahlden did not assume any of Mr. Dammer's job duties when he began working for MBNA in April 1991. Further, Mr. Ahlden was not similarly situated to any other employee in the import department because he was an expatriate, a resident of Germany under contract with Mercedes-Benz A.G., working for MBNA for a limited time. Mr. Ahlden was brought to this country because of his expertise in "logistics," a field unrelated to Mr. Dammer's duties. Pursuant to his contract, Mr.

Ahlden was sent to the United States to work for MBNA until April 1995. Moreover, Mr. Dammer specifically admits that Mr. Ahlden was his superior because he "ran the department." Additionally, Mr. Ahlden did not replace Mr. Dammer after the reduction-in-force.

Finally, Mr. Dammer contended that age was "an influence" in Mr. Ruppert's decision to eliminate his position. In support of this contention, Mr. Dammer testified that Mr. Ruppert, who is merely four years younger than Mr. Dammer, "didn't like anyone working for him who was older." Nonetheless, Mr. Dammer admitted that Ernest Angelino, the manager of domestic traffic, is older that Mr. Ruppert and retained his position in Mr. Ruppert's department after the reduction-in-force. Further, the 53 year old clerk (discussed in the immediately preceding paragraph) is also older than Mr. Ruppert and was not terminated as a result of the reduction-in-force.

Mr. Dammer admitted that he never complained to anyone that he was the victim of age discrimination prior to his September 4, 1991 termination. Nor did he make any such claim on the date of his termination. Within days after his position was eliminated Mr. Dammer contacted and met with Robert Ertzen of MBNA's human resources department, but Mr. Dammer never mentioned age discrimination at this meeting.

Mr. Dammer expressly acknowledged MBNA's right to reduce staff. Finally, Mr. Dammer testified that he did not object to MBNA eliminating the import supervisor position; he just objected to MBNA eliminating the position while he held it.

SUMMARY OF ARGUMENT

The record below establishes that Mr. Dammer could not demonstrate, through direct or circumstantial evidence, any

facts which would allow one to conclude that he could bear the burden of proving that age was a determinative factor in MBNA's decision to eliminate his position. Although he was given every opportunity to present the District Court and the Circuit Court with evidence from which an age animus could be inferred, Mr. Dammer failed to present evidence sufficient to make out even a prima facie case of age discrimination. Significantly, Mr. Dammer could not establish that he — *and others within the protected class* — were treated less favorably than those outside the protected class because the statistical evidence clearly demonstrated that employees who were over 40 faired better than employees under 40. Moreover, Mr. Dammer proffered nothing beyond subjective conclusions, which he requested the courts below to deem "reasonable inferences," to support his allegation that MBNA's legitimate, nondiscriminatory reasons for the reduction-in-force and the elimination of his position were pretext. The District Court properly found that Mr. Dammer's subjective conclusions were wholly unsupported by the evidence, and thus awarded summary judgment to MBNA on Mr. Dammer's age discrimination claims and the Circuit Court properly upheld the grant of summary judgment.

This Court should refuse to consider the questions raised by Mr. Dammer's Petition for Writ of Certiorari because, as will be discussed at length below, both questions raised by the Petition are moot in that both presume that courts below held that the final element of a *prima facie* case of age discrimination, when considered in the context of a reduction-in-force, requires that a plaintiff prove that he was replaced by an individual outside the protected class (*i.e.*, someone under the age of 40). Both questions further presuppose that both courts below found that Mr. Dammer failed to establish a *prima facie* case because he could not establish that he was replaced at all — by someone within or outside the protected class.

While both courts below found that Mr. Dammer could not establish that he was replaced by a younger individual, neither court terminated its analysis after reaching that conclusion. Instead, both courts went on to analyze Mr. Dammer's ability to establish another element — an element unique to an age discrimination case in the context of a reduction-in-force — specifically: whether Mr. Dammer *and others within the protected class* were treated less favorably during the reduction-in-force that those outside the class. The uncontroverted statistical evidence clearly established that employees over the age of 40 actually faired better than those under the age of 40. As such, both courts properly held that Mr. Dammer could not establish a *prima facie* case of age discrimination.

It should also be noted that even though both courts below found that Mr. Dammer could not establish a *prima facie* case of age discrimination, each assumed *arguendo* that Mr. Dammer had met his burden and continued their analysis to determine whether Mr. Dammer could establish that MBNA's proffered reason for his termination — its reduction-in-force — was a mere pretext for age discrimination. Both courts found that Mr. Dammer could offer no evidence whatsoever that would could lead a jury to conclude that the reduction-in-force was a pretext.

Inasmuch as neither court below granted (or upheld) summary judgment because Mr. Dammer failed to establish that he was replaced by a younger employee, the questions presented to this Court by Mr. Dammer are moot. Therefore, this Court should refuse to consider the questions raised by Mr. Dammer and should refuse to grant the subject Petition for Writ of Certiorari.

REASONS FOR DENYING THE WRIT

I.

THIS COURT DOES NOT HAVE JURISDICTION TO DECIDE THE QUESTIONS PRESENTED BY PETITIONER IN THAT BOTH QUESTIONS ARE MOOT BECAUSE NEITHER COURT BELOW RESTED ITS DECISION TO ENTER OR UPHOLD SUMMARY JUDGMENT ON THE FACT THAT MR. DAMMER FAILED TO ESTABLISH THAT HE WAS REPLACED BY AN INDIVIDUAL UNDER 40.

It has long been held that this Court has no power to issue advisory opinions on questions that are moot. *North Carolina v. Rice*, 404 U.S. 244, 246, 92 S. Ct. 402, 404, 30 L. Ed. 2d 413 (1971); *St. Pierre v. United States*, 319 U.S. 41, 42, 63 S. Ct. 910, 911, 87 L. Ed. 1199 (1943); *Church of Scientology of California v. United States*, 506 U.S. 9, 12, 113 S. Ct. 447, 121 L. Ed. 2d 313, 319 (1992).

A question is deemed moot, and thus outside the jurisdiction of this Court, if the decision of this Court would not "affect the rights of the litigants before it." *Rice, supra*, 404 U.S. at 246; *St. Pierre, supra*, 319 U.S. at 42.

As noted by this Court in *Rice*, to be cognizable, the questions raised in a petition must "[touch] the legal relations of the parties having adverse relations." *Id.* at 246 (citations omitted). In other words, consideration of the question or questions presented must be such that an answer rendered by this Court would result in "specific relief" to one of the parties in interest. *Id.*

In the case at bar, Mr. Dammer presents two questions, both

of which focus on the fourth and final element of a *prima facie* case of a plaintiff asserting age discrimination in the context of a reduction-in-force. Both questions presume two things: (a) that both courts below granted (or upheld) summary judgment against Mr. Dammer because he could not establish a *prima facie* case of age discrimination because he failed to show that he was replaced by someone outside the protected class; and (b) that both courts below terminated the analysis of the merits of his case once they determined that Mr. Dammer could not establish a *prima facie* case.

Both questions presented by Mr. Dammer are moot because regardless of how this Court answers either question, there will be no resulting relief to Mr. Dammer or MBNA. Summary judgment was not entered in favor of MBNA solely because Mr. Dammer failed to show that he was replaced by someone under the age of 40. Both courts below specifically held that the uncontroverted evidence clearly established that in connection with its reduction-in-force, employees over the age of 40 faired better than those under the age of 40. Further, both courts below noted that this was the case not only company-wide, but also in Mr. Dammer's own department. (Petition at App. 7a and 23a.) As such, even if this Court grants Mr. Dammer's Petition and accepts his theory that a plaintiff asserting age discrimination in the context of a reduction-in-force need not show that he was replaced by someone under the age of 40, that decision will not affect the rights of Mr. Dammer or MBNA because neither decision below rested on Mr. Dammer's failure to present evidence to that effect.

Moreover, neither court below concluded the analysis of the merits of Mr. Dammer's case after determining that he could not establish a *prima facie* case of age discrimination. Instead, both courts below went further and assumed that he had met his *prima facie* burden. However, both courts below held that even if Mr.

Dammer could establish a *prima facie* case, he could not sustain the ultimate burden of proof because he failed to offer any evidence to show that MBNA's proffered reason for his termination — the reduction-in-force — was pretext.

Accordingly, even if this Court were to render an opinion on the elements of a *prima facie* case of age discrimination in the context of a reduction-in-force, and even if this Court found that the courts below should have analyzed the merits of Mr. Dammer's *prima facie* case under one of the two theories proposed by Mr. Dammer, that decision would not affect the rights of Mr. Dammer or MBNA because neither court rendered its decision based solely on the basis of Mr. Dammer's failure to establish a *prima facie* case of age discrimination.

II.

MR. DAMMER COULD NOT ESTABLISH A *PRIMA FACIE* CASE OF AGE DISCRIMINATION BELOW BECAUSE HE COULD NOT SHOW THAT EMPLOYEES OUTSIDE THE PROTECTED CLASS WERE TREATED MORE FAVORABLY THAN THOSE WITHIN THE PROTECTED CLASS.

A plaintiff's conclusory allegations are insufficient to prevent summary judgment. As this Court has emphasized, summary judgment procedures demand that the party opposing the motion present more than ephemeral allegations of some factual dispute. *See, e.g. Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986), *cert. denied*, 484 U.S. 1066, 108 S. Ct. 1028, 98 L. Ed. 2d 992 (U.S. Dist. Col. 1988); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986), *cert. denied*, 481 U.S. 1029, 107 S. Ct. 1955, 95 L. Ed. 2d

527 (1987). Where a prima facie right to summary judgment exists, as here, the burden is on the party opposing the motion to demonstrate, by competent evidence, that a genuine issue of fact exists for trial. *Celotex, supra,* 477 U.S. at 323-325.

The summary judgment standards are the same in ADEA actions as in other cases: summary judgment is appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. *Perry v. Prudential-Bache Securities, Inc.,* 738 F. Supp. 843, 850 (D.N.J.), *aff'd,* 904 F.2d 696 (3d Cir. 1989), *cert. denied,* 498 U.S. 958, 111 S. Ct. 386, 112 L. Ed. 2d 397 (1990) (citing *Celotex, supra*). Although the moving party bears the burden of demonstrating the absence of a dispute as to material facts, once a case for summary judgment has been made, the party opposing the motion must come forward with specific facts necessitating a trial. *Mullen v. New Jersey Steel Corp.,* 733 F. Supp. 1534, 1542 (D.N.J. 1990) (citing *Anderson, supra,* 477 U.S. at 249-250).

Mr. Dammer could not demonstrate the existence of facts that would allow one, even when viewing the record in the most indulgent way, to conclude that he could bear the ultimate burden of proving that age was a determinative factor in MBNA's decision to eliminate his position. *Duffy v. Wheeling Pittsburgh Steel Corp.,* 738 F.2d 1393, 1395 (3d Cir.), *cert. denied,* 469 U.S. 1087, 105 S. Ct. 592, 83 L. Ed. 2d 702 (1984) (emphasis added).

Mr. Dammer avers that this Court should grant certiorari because there is a conflict amongst the circuits with respect to the evidentiary burdens placed upon plaintiffs in age discrimination cases. That is not true because the Third Circuit adopts the same evidentiary burdens in ADEA claims as set forth by this Court in actions under Title VII. *Chipollini v. Spencer Gifts, Inc.,* 814 F.2d 893, 897 (3d Cir.), *cert. dismissed,* 483 U.S. 1052, 108 S. Ct.

26, 97 L. Ed.2d 815 (1987) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), *aff'd*, 528 F.2d 1102 (1976) and *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981)); *Turner v. Schering-Plough Corp.*, 901 F.2d 335, 341 (3d Cir. 1990).

In the case at bar, to make out even a *prima facie* case, Mr. Dammer was required to demonstrate that:

> (1) he is a member of the protected class, *i.e.*, age 40 or over;
>
> (2) he was qualified for the job;
>
> (3) notwithstanding his qualifications, he was discharged as a result of a reduction-in-force; and
>
> (4) during the course of the reduction-in-force, employees who were not within the protected class were treated more favorably.

Healy, supra, 860 F.2d at 1214; *Duffy, supra*, 738 F.2d at 1395; *Massarsky v. General Motors Corp.*, 706 F.2d 111, 118 (3d Cir. 1983), *cert. denied*, 464 U.S. 937, 104 S. Ct. 348, 78 L. Ed. 2d 314.

MBNA did not argue, and neither court below found, that Mr. Dammer had to establish that he was replaced, actually or constructively, by an individual outside the protected class. The case law is clear: the *McDonnell Douglas* standard is flexible and, in the case of a reduction-in-force, must be molded to properly take into consideration factors unique to such a situation. Thus, as noted in the cases cited immediately above, in the case of a reduction-in-force, the fourth prong of the

analysis does not address by whom the employee was replaced (because the assumption is that a plaintiff will not be able to point to any replacement inasmuch as the employer is cutting staff), but rather focuses on the manner in which employees over the age of 40 were treated in comparison to employees under the age of 40.

In the case at bar, the analysis of both courts below could have stopped here because in spite of efforts to obfuscate the record and manufacture questions of fact, it is inescapably clear that Mr. Dammer failed to set forth evidence which meets the final element of a *prima facie* case in the context of a reduction-in-force.

Mr. Dammer proffered no evidence that employees under the age of 40 — either within his department or elsewhere within MBNA — were treated more favorably. In fact, the statistical evidence clearly shows that employees over 40 faired better than did younger employees and both courts below relied upon that uncontroverted statistical evidence in concluding that Mr. Dammer could not establish a *prima facie* case of age discrimination. (Petition at App. 7a and 23a.)

Mr. Dammer's only attempt to refute the statistical evidence below consisted of characterizing the evidence as self-serving, vague and/or questionable. There is nothing vague or questionable about MBNA's very clear and simple statistical evidence. Numbers are numbers, they speak for themselves. Mr. Dammer's bald assertions did nothing to diminish the truth — and the truth is that company-wide, 55.41% of MBNA employees under the age of 40 were discharged as a result of the reduction-in-force, while only 44.59% of employees over the age of 40 were discharged. The same holds true for petitioner's department, wherein the reduction-in-force resulted in a 1.01% increase in the number of employees within the protected class. These facts, in part, compelled the EEOC to find that MBNA did

not violate the ADEA, and to reject petitioner's charge of age discrimination. These facts also support the validity of the decisions below and, more importantly, underscore the reason why this Court should not grant Mr. Dammer's Petition. The only questions presented assume that both courts below failed to consider the relevant fourth prong (*i.e.*, whether younger employee were treated more favorable than older employees). A review of the opinions below clearly indicates that this is not the case. Both courts properly noted that employees within the protected class were treated *better* than employees outside the protected class. As such, Mr. Dammer's Petition fails to present any question which would warrant consideration by this Court.

The mere fact that petitioner, who is within the protected class, lost his job does not give rise to a *prima facie* cause of action for age discrimination. Petitioner must go beyond that and show that he *and other protected employees* were treated less favorably than those outside the protected class. *See, e.g., Massarsky, supra,* 706 F.2d at 121; *Holt v. Gamewell Corp.*, 797 F.2d 36, 38 (1st Cir. 1986). Mr. Dammer could not do that; therefore, as a matter of law, he could not establish a *prima facie* case of age discrimination under federal or state law.

The District Court and Circuit Court specifically found that Mr. Dammer did not demonstrate through direct or circumstantial evidence, that he was replaced by an employee outside the protected class. Mr. Dammer cited — out of context — the District Court's statement that it "is not clear whether [plaintiff] was replaced with someone not in the protected class." Mr. Dammer cited this portion of the opinion in an attempt to mislead the Circuit Court and insinuate that the District Court found in MBNA's favor without reaching a conclusion of fact and/or law as to whether or not Mr. Dammer was replaced by a younger employee. Mr. Dammer conveniently omitted the immediately following paragraph of the Opinion wherein the

District Court specifically found that: (a) employees both within and outside the class assumed petitioner's duties (not replaced him) after his position was eliminated; and (b) approximately one-half of the employees terminated during the reduction-in-force were not within the protected class. (Petition at App. 23a.)

Both courts below properly found that petitioner could not show that he and other protected employees were treated less favorably than those outside the protected class. Therefore, the District Court properly held that, as a matter of law, Mr. Dammer could not establish a *prima facie* case of age discrimination under federal or state law and the Circuit Court properly upheld that decision.

Inasmuch as neither court below held that Mr. Dammer had to prove that he was replaced by an individual outside the protected class in order to establish his *prima facie* case, an answer to the questions presented by this Petition would not affect the rights of either party. As such, any opinion would be merely advisory. Accordingly, this Court should deny Mr. Dammer's Petition because it lacks jurisdiction to consider the questions presented.

III.

REGARDLESS OF WHAT THIS COURT DEEMS TO BE THE PROPER FINAL ELEMENT OF A *PRIMA FACIE* CASE, THE PARTIES' RIGHTS WILL NOT BE AFFECTED BECAUSE MR. DAMMER DOES NOT, BY THIS PETITION, CHALLENGE THE LOWER COURTS' FINDINGS REGARDING HIS FAILURE TO MEET HIS ULTIMATE BURDEN OF PROVING PRETEXT.

Notwithstanding their finding that Mr. Dammer did not establish a *prima* facie case of age discrimination, both courts

below went beyond the *prima facie* analysis, to find in MBNA's favor because Mr. Dammer proffered no evidence to support the allegation that MBNA's nondiscriminatory business reasons for eliminating his position were pretext. (Petition at App. 7a-8a and 23a.)[1] By his own admission, Mr. Dammer could point to no direct evidence of discrimination. (Petition at 6.) Instead, Mr. Dammer jumped to several conclusions which are wholly unsupported by evidence and asks that this Court find them "reasonable inferences." Mere subjective conclusions or assertions offered by counsel in a brief do not establish the existence of a genuine issue of material fact. *Perez Perez v. Key Pharmaceuticals, Inc.*, 729 F. Supp. 204, 207 (D. Puerto Rico 1989).

---

1. During his deposition, Mr. Dammer pointed to a stray remark allegedly made by Mr. Ruppert, "age before beauty," as circumstantial evidence of an age animus. Below (and here again), Mr. Dammer admitted that he had no direct evidence of age discrimination and argued that MBNA raised the issue of the stray remark "as a smoke screen to hide the strong inferences of circumstantial evidence of age discrimination." In fact, MBNA raised the issue because it was the *only* circumstantial evidence identified by Mr. Dammer. The stray remark is insufficient to give rise to an inference of age discrimination. *See, e.g., Mullen v. New Jersey Steel Corp.*, 733 F. Supp. 1534, 1551 (D.N.J. 1990); *Perry v. Prudential-Bache Securities, Inc.*, 738 F. Supp. 843, 851 (D.N.J. 1989), *aff'd*, 904 F.2d 696 (3d Cir. 1989); *Ezold v. Wolf, Block, Schorr and Solis-Cohen*, 983 F.2d 509, 545 (3d Cir. 1992), *cert. denied*, 114 S. Ct. 88, 126 L. Ed. 2d 56 (1993); *Melnyk v. Adria Laboratories*, 799 F. Supp. 301, 319 (W.D.N.Y. 1992); *Gagne v. Northwestern Nat. Ins. Co.*, 881 F.2d 309, 314 (6th Cir. 1989); *Waggoner v. City of Garland, Texas*, 987 F.2d 1160, 1166 (5th Cir. 1993); *Merrick v. Farmers Ins. Group*, 892 F.2d 1434, 1438 (9th Cir. 1990). This is particularly true in the case at bar because, as noted by the courts, Mr. Dammer, who was born in Germany, admitted that the statement made by Mr. Ruppert, also born in Germany, is a German expression of respect. (Petition at App. 8a and 23a-24a.) More importantly, Mr. Dammer, both below and before this Court, specifically abandoned any claim that the remark is evidence of age discrimination.

Below, Mr. Dammer relied upon *Fuentes v. Perskie*, 32 F.3d 759 (3d Cir. 1994) and *Torre v. Casio, Inc.*, 42 F.3d 825 (1994) in support of his contention that to withstand summary judgment he need only discredit MBNA's proffered reasons for his termination, or adduce evidence which indicates that discrimination was more likely than not the motivating or determinative factor for the termination. Apart from utterly failing to discredit MBNA's justification for eliminating petitioner's position, the cases cited by petitioner supported MBNA's application for summary judgment.

Fuentes, supra, states that a plaintiff must show that the proffered reasons were either "post hoc fabrication or otherwise did not actually motivate the employment action . . . ." *Id.* at 764. Further, the *Fuentes* court states that a plaintiff must "cast substantial doubt" on the proffered reasons, and that it is not enough to show "that the employer's decision was wrong or mistaken, since the factual dispute at issue is whether discriminatory animus motivated the employer, not whether the employer is wise, shrewd, prudent, or competent." *Id.* at 764-765. In *Fuentes,* the court granted summary judgment in favor of the defendant-employer because the plaintiff failed to "meaningfully throw into question" the defendant's proffered reasons. *Id.* at 764. The court stated that the fact that a department head who, faced with a directive to eliminate staff because of shrinking budgets, reorganized his department and hired new managers who he felt were best suited for positions created during the reorganization, did "not throw real doubt on the employer's proffered reason" for the plaintiff's termination.

Mr. Dammer argued that on the same type of facts present in *Fuentes,* he had succeeded in casting doubt on MBNA's explanation of the reorganization of the Import Department. He did not! The uncontroverted evidence clearly indicates that no one was brought in to replace Mr. Dammer and that his duties

were absorbed by the remaining staff. Mr. Ahlden was brought to the United States from Germany to help MBNA streamline and restructure its import department, thus making it more efficient. Prior to coming to the United States, Mr. Ahlden attended college and universities in Brenerhaven, Germany studying logistics. Thereafter, he joined Mercedes-Benz in Stuttgart, Germany where he was responsible for logistics. In Germany, Mr. Ahlden was responsible for, among other things, developing transportation routes, negotiating contracts, analyzing transportation flow and overseas customers' needs, and developing the best modes of transporting parts. When he arrived in this country, Mr. Ahlden, consistent with his background, education and expertise, assumed the duties, responsibility and authority necessary to restructure and streamline MBNA's Import Department.

In an effort to create a factual dispute, Mr. Dammer states that Mr. Ahlden basically took over the Import Department. Petitioner appears to be suggesting that Mr. Ahlden was brought to this country to replace him. Again, this is simply false. By Mr. Dammer's own admissions, Mr. Ahlden was not in an equivalent job position. Clearly, Mr. Ahlden assumed a position with far more responsibility and authority than Mr. Dammer. Mr. Dammer had no qualifications in Mr. Ahlden's area of expertise. Instead, Mr. Dammer supervised import clerks prior to the elimination of his position. After the restructuring, there were fewer import clerks and thus no need for a superfluous layer of supervision. The effort to suggest that Mr. Ahlden took over Mr. Dammer's duties is simply not supported in the record.

Moreover, Mr. Ahlden's subsequent promotion does nothing to bolster petitioner's unsupported allegations that Mr. Ahlden took over his position. Mr. Ahlden was not promoted to Mr. Dammer's position. When Mr. Ahlden was promoted, he replaced Mr. Dammer's supervisor, Mr. Lenz. Mr. Dammer's

position of import supervisor was eliminated for unrelated reasons having nothing to do with Mr. Ahlden. It is undisputed that since there were fewer import clerks after the reorganization, there was no need for an import supervisor and petitioner's position was eliminated. Thus petitioner's preoccupation with Mr. Ahlden's unrelated hiring is nothing more than a smoke screen.

To further support his claim, Mr. Dammer relied upon *Torre, supra.* In *Torre,* unlike the case at bar, the plaintiff offered far more than subjective, conclusory statements to refute the reasons given for his termination. The plaintiff proffered hard evidence that *inter alia*: when plaintiff's supervisor first took over the department, he sought to replace plaintiff with a younger employee; during his search for a replacement, the supervisor rejected one candidate because he did not want to hire anyone over 35; there was substantial evidence that the supervisor who exhibited age hostility played a key role in plaintiff's transfer and ultimate termination; the position to which plaintiff was transferred immediately prior to his termination was previously eliminated because there were insufficient sales to support the position; and the defendant changed its testimony regarding the alleged reason for the reduction-in-force which resulted in plaintiff's job being eliminated. Based on these documented reasons, among others, the *Torre* court concluded that a reasonable jury might find that the plaintiff's supervisor was biased against plaintiff because of his age, and that this animus resulted in plaintiff's transfer to a dead end job, and ultimately his termination. *Id.* at 834-835.

In the case at bar, there are no facts, documented or otherwise, which rise to the level of proofs in *Torre.* Mr. Dammer argues that an inference can be drawn that Mr. Ruppert had a "premeditated plan" to get rid of older workers and replace them with younger employees. However, the facts, which are undisputed, fail to support Mr. Dammer's claims. For example,

Mr. Dammer was the only employee within the protected class whose position was eliminated during the reorganization of the import department. Two of the positions which were eliminated were vacant at the time of the reorganization. The other position which was eliminated, an import clerk's position, was held by an employee *under* the age of forty. Further, another import clerk who was 53, and thus within the protected class, was retained. Moreover, Mr. Dammer admitted that another employee, Ernest Angelino, the manager of domestic traffic, who also reports to Mr. Ruppert and who is older than Mr. Ruppert, was retained by Mr. Ruppert after the reduction-in-force.[2]

To support his claim of pretext, Mr. Dammer harkens back to Mr. Ruppert's inquiry about his decision regarding early retirement before his option period expired. According to Mr. Dammer, this fact indicates Mr. Ruppert's desire to get rid of him. The record — in particular Mr. Dammer's own testimony — reveals that Mr. Ruppert only questioned Mr. Dammer because he wanted to know if he would have to spend time and money seeking to replace him. It is true that Mr. Ruppert did replace the other employees who opted for early retirement but significantly, one of the new hires was within the protected age group.[3]

---

2. The other employees over forty who left MBNA within one year prior to the reduction-in-force were those who elected early retirement. In order for plaintiff's inference to make sense, a jury would have to conclude that MBNA offered early retirement to *all* eligible employees, *company-wide*, just so that Mr. Ruppert could weed out a few older workers in his small department.

3. This further illustrates the flawed logic in petitioner's "inference." If the company-wide early retirement program was subterfuge designed to cover up Mr. Ruppert's desire to weed out older workers in his department, Mr. Ruppert certainly would not have hired a 53 year old (just three years younger than Mr. Dammer and one year *older* than Mr. Ruppert) as a replacement. However, the uncontroverted evidence is that one of the three individuals hired to replace clerks who opted for early retirement was, in fact, 53!

Petitioner argues that an inference can be drawn that at the time early retirement was offered to him (and every other eligible employee company-wide), Mr. Ruppert was already planning to put Mr. Ahlden in his position. This is nonsense. As set forth above, Mr. Ahlden did not replace Mr. Dammer.

Petitioner also attempted to mislead the courts below by arguing that positions were created and filled with younger employees, while his position was eliminated. In support of this contention he points to a memorandum which shows that two clerk positions were "open" on July 25, 1991. In fact, the "open" positions as well as Mr. Dammer's position and another clerk position were all eliminated at the time of the work force reduction. There were no positions filled at the time that Mr. Dammer's position was eliminated because there were no open positions.

Finally, Mr. Dammer has consistently overlooked one very important fact, Mr. Ruppert neither instituted the early retirement offer nor the work force reduction. Moreover, Mr. Ruppert was not the ultimate decision maker with respect to implementation of MBNA's reduction-in-force. The reduction-in-force was mandated by MBNA's board of directors. The human resource department instructed each department to conduct an analysis. Final approval and eliminations were made by executive management following review and analysis by the human resource department and MBNA's legal department.

Mr. Dammer utterly failed to show any age animus on the part of Mr. Ruppert who himself was well within the protected age group. More importantly, he has not — and cannot — asserted an age animus on the part of those above Mr. Ruppert — *i.e.*, those responsible for implementing the early retirement program and the reduction-in-force. Nor has petitioner shown any evidence which disputes the economic need for MBNA to

down-size its entire workforce. Therefore, petitioner did not met his burden of casting any, let alone substantial, doubt on MBNA's proffered reasons for the elimination of his job. He failed to adduce any facts to support even an inference of "pretext."

CONCLUSION

Accordingly, as matter of law, MBNA was entitled to summary judgment and this Court should not grant Mr. Dammer's Petition which raises questions which are moot because they ignore the careful, complete and correct analyses undertaken by the courts below.

Mr. Dammer does not, by this Petition present any question as to the lower courts' findings regarding his failure to prove pretext. As such, this Court lacks jurisdiction because an opinion on the questions presented will not affect the rights of either party. Summary judgment will stand because it was granted (and upheld) not only because Mr. Dammer failed to establish a *prima facie* case of age discrimination, but also because he could not meet his ultimate burden of proving pretext. Therefore, in this case and as to these parties, any opinion on the questions presented in the subject Petition would be merely advisory. For the foregoing reasons, MBNA respectfully requests that this Court deny Mr. Dammer's Petition For Writ of Certiorari.

Respectfully submitted,

CARMINE A. IANNACCONE
Counsel of Record
TERRI L. FREEMAN
HANNOCH WEISMAN
A Professional Corporation
Attorneys for Respondent

Dated: June 24, 1996